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SEC

SERVICE DATE – MARCH 14, 2006

SURFACE TRANSPORTATION BOARD

NOTICE

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

AGENCY: Surface Transportation Board.

ACTION: Notice of Public Hearing.

SUMMARY: The Surface Transportation Board (Board) will hold a public hearing beginning at 9:00 a.m. on Thursday, May 11, 2006, at its offices in Washington, DC, to provide interested persons an opportunity to express their views on the subject of fuel surcharges collected by railroads. Persons wishing to speak at the hearing should notify the Board in writing.

DATES: The public hearing will take place on May 11, 2006. Any person wishing to speak at the hearing should file with the Board a written notice of intent to participate, and should indicate a requested time allotment, as soon as possible but no later than April 20, 2006. Each speaker should also file with the Board his/her written testimony by April 27, 2006. Written submissions by interested persons who do not wish to appear at the hearing will also be due by April 27, 2006.

ADDRESSES: All notices of intent to participate and testimony may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should comply with instructions on the Board's "www.stb.dot.gov" website, at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 copies of the filing (referring to STB Ex Parte No. 661) to: Surface Transportation Board, Attn: STB Ex Parte No. 661, 1925 K Street, N.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION, CONTACT: Joseph H. Dettmar, (202) 565-1609.  
[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: (800) 877-8339.]

SUPPLEMENTARY INFORMATION: The Board will hold a public hearing to provide a forum for the expression of views by rail shippers, railroads, and other interested persons, on the manner in which fuel surcharges are calculated and charged by railroads. The cost of fuel is a significant component of the operating costs of providing rail service, and railroads can reasonably be expected to devise methods to collect increases in those costs from their shippers. However, the rail shipper community has voiced concerns that recent fuel surcharges collected by railroads are designed to recover amounts over and above increased fuel costs.

A surcharge is a separately identified component of the total rate that is charged for the transportation involved. The Board's authority to regulate the level of a railroad's rates is limited. The Board only has jurisdiction over a railroad's common carriage rates, not rates governed by a rail transportation contract negotiated by the shipper and railroad. 49 U.S.C. 10709. Even as to a railroad's common carriage rates, the Board can review the level of the rate only if there is no effective competition from other rail carriers or modes of transportation for the transportation to which the rate applies. 49 U.S.C. 10707(a). Moreover, Congress has precluded the Board from regulating rates which produce revenues that are less than 180% of the carrier's variable costs of providing the service involved. 49 U.S.C. 10707(d)(1)(A). Therefore, this hearing is not intended to address the level of surcharges.

On the other hand, the Board has broad authority over the reasonableness of a railroad's practices. 49 U.S.C. 10702(2). The Board cannot use its authority over the reasonableness of a carrier's practices to regulate the level of a carrier's rates. See Union Pacific R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989). But, to the extent that shippers are complaining of the railroad practice of labeling a rate increase as a fuel surcharge when the increase is not directly and closely correlated to increases in the cost of fuel for the particular movement to which the surcharge is applied, the Board arguably could consider that as a possible unreasonable practice.<sup>1</sup> Thus, it is that aspect of the shippers' concerns — whether railroad fuel surcharges are being set in such a manner as to insure that they are used only to recover the increased cost of fuel for the particular movements to which the surcharge is applied — that will be the subject of this hearing. Railroads are asked to present (individual not collective) testimony on how they set fuel surcharges, and whether their fuel surcharges fairly reflect the increasing fuel costs of the particular movements to which they are applied.

We are holding this hearing based on the Board's authority to inquire into the management of railroads and to obtain information that is needed to carry out the statute that the Board administers. 49 U.S.C. 721(b). To carry out its various statutory responsibilities, the Board requires railroads to collect and submit to the Board extensive cost and revenue information. 49 CFR parts 1200-1280. In this hearing, shippers and railroads are asked to comment on whether and how those reporting requirements should be adjusted to provide rail customers with better information on a carrier's fuel costs and the revenues collected through fuel surcharges. Making this information publicly available should enable shippers to better identify and protect against inappropriate surcharges and to more reliably forecast their future transportation costs.

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<sup>1</sup> If a complainant sought to challenge a particular fuel surcharge that applied to exempt classes of traffic, the complainant would have to seek revocation of the exemption (under 49 U.S.C. 10502(d)) to the extent necessary before the Board could take regulatory action with regard to that traffic.

Railroads have expressed concern that engaging in multi-carrier discussions regarding their fuel surcharge practices could expose them to potential liability under federal antitrust laws. This hearing will be structured to avoid such concerns. Railroads will be expected to submit separate, independent testimony at this hearing. They will not be asked to exchange information privately regarding their respective fuel surcharge practices or to agree upon a common method to calculate fuel surcharges. The agency is exercising its power to obtain from the regulated carriers information it needs to determine if a problem exists that requires agency action. 49 U.S.C. 721(b). Such a public conversation at the formal request of the agency should not implicate the federal antitrust laws. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (petitioning immunity); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (Noerr immunity extends to petitioning government administrative agencies). Nor should any inference to the contrary be drawn merely from their participation at these hearings.

Date of Hearing. The hearing will begin at 9:00 a.m. on May 11, 2006, in the 7th floor hearing room at the Board's headquarters in Washington, DC, and will continue, with short breaks if necessary, until every person scheduled to speak has been heard.

Board Releases and Live Audio Available Via the Internet. Decisions and notices of the Board, including this notice, are available on the Board's website at "www.stb.dot.gov." This hearing will be available on the Board's website by live audio streaming. To access the hearing, click on the "Live Audio" link under "Information Center" at the left side of the home page beginning at 9:00 a.m. on May 11, 2006.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Dated: March 13, 2006.

Vernon A. Williams  
Secretary